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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

DENNIS L. O'CONNOR

Petitioner,

vs.

THE STATE OF NEVADA, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS L. O'CONNOR
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121
Petitioner in counsel pro se

QUESTIONS PRESENTED

1. Whether a state is entitled to a qualified rather than an absolute sovereign immunity from suit in a 42 U.S.C.§ 1983 civil rights action for failure to govern her governing state agencies and officials.

2. Whether a county prosecutor is absolutely immune from suit in a 42 U.S.C. § 1983 action for the malicious failure and neglect to investigate sworn criminal complaints.

3. Whether a municipal court judge in clear absence of all jurisdiction is absolutely immune in a 42 U.S.C. § 1983, 1985, and1986 action for the non-judicial and conspiratorial act of obstruction of justice by appearing as a *witness* for the prosecution during a trial de novo in substitution for witnesses required for cross-examination by the defendent.

4. Whether the Nevada State Bar *Corporation* functions autonomously from the state and is a *person* that can sue and be sued in civil rights actions.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Dennis L. O'Connor, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 24, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto, p. 1a, *infra*.

The opinion of the District Court for the District of Nevada, which appears in the appendix hereto, p. 4a, *infra*, is reported at 507 F. Supp. 546 (1981).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 24, 1982. On September 22, 1982, the Ninth Circuit Court of Appeals entered an Order granting the petitioner's motion for a stay of the mandate. The Court of Appeals ordered that the petitioner file a petition for Writ of Certiorari with the Clerk of the Supreme Court of the United States on or before October 14, 1982 in order to stay the mandate until a final disposition by the Supreme Court of the United States, p. 14a, *infra*.

This petition is being docketed in this Court by October 14, 1982.

This Court's jurisdiction is invoked under 28 U.S.C.§ 1254(1).

QUESTIONS PRESENTED

1. Whether a state is entitled to a qualified rather than an absolute sovereign immunity from suit in a 42 U.S.C.§ 1983 civil rights action for failure to govern her governing state agencies and officials.

2. Whether a county prosecutor is absolutely immune from suit in a 42 U.S.C. § 1983 action for the malicious failure and neglect to investigate sworn criminal complaints.

3. Whether a municipal court judge in clear absence of all jurisdiction is absolutely immune in a 42 U.S.C. 1983, 1985, and1986 action for the non-judicial and conspiratorial act of obstruction of justice by appearing as a *witness* for the prosecution during a trial de novo in substitution for witnesses required for cross-examination by the defendent.

4. Whether the Nevada State Bar *Corporation* functions autonomously from the state and is a *person* that can sue and be sued in civil rights actions.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes involved in this case appear in the Appendix hereto, at p. 15a - 18a, *infra.*

STATEMENT OF THE CASE

This is a suit seeking general and punitive damages from multiple defendants for the wreckless and malicious deprivation of constitutional rights. The defendants are the State of Nevada, the Nevada State Bar Corporation, Churchill County District Attorney John Hill, and Fallon Municiple Court Judge William Teurman. The City of Fallon is also a defendant although it has not as yet been dismissed by the lower court.

The jurisdiction of the District Court was invoked under 28 U.S.C.§ 1331, 1343 and 42 U.S.C.§ 1983, 1985, and 1986.

The petitioner, Mr. O'Connor, has been denied any semblance of due process of law, equal opportunity in the state courts, and equal protection of the laws in two criminal trials, two civil trials, and an appeal. The petitioner has also been denied equal protection of state statutory laws enacted

to protect individuals from corrupt actions of the state by and through her officials and agencies.

The heart of this entire action lies with the arbitrariness and vindictiveness of a city attorney who misused his public office in a conflict of interest between the duties of prosecutor and private counsel in civil litigation.

The petitioner and his wife have previously been before this Court on appeal from the State of Nevada in an action related to the petition herein. The papers were treated as a petition for a Writ of Certiorari which was denied for a want of jurisdiction. *O'Connor v. Palludan Corp.*, 101 S. Ct. 343 (1980). Petition for rehearing denied January 12, 1981, 101 S. Ct. 905 (1981).

The O'Connors brought that action on *appeal* to this court due to a denial of access to the Supreme Court of the State of Nevada pursuant to rule 46(b) of the Nevada Rules of Appellate Procedure which set forth the following:

> *Appearances in Proper Person; no party except a habeas corpus petitioner may appear in proper person before the Supreme Court.* (Nevada Revised Statutes, Vol. 2, p. 1433 1979).

That rule has since been modified. However, the petitioner and his family have been financially and irreparably damaged due to the abuse of due process by the State of Nevada by and through her agency the Supreme Court of the State of Nevada.

The O'Connors also raised the issue of the Seventh Amendment of the Federal Constitution and its application to the State of Nevada by and through the *Northwest Ordinance of 1787* on appeal before this Court in *O'Connor v. Palludan Corp., supra.* The dispute over the Seventh Amendment between the O'Connors and the State of Nevada did not involve the amount of persons on the jury. Rather, it involved the right to a common law jury trial in an eviction proceeding particularly when the O'Connors had

been granted an in forma pauperis application. The Third Judicial District Court of Nevada granted a summary eviction and denied the O'Connors a jury trial implying that there was no right to a jury trial in an eviction proceeding. The O'Connors filed all of the necessary subsequent motions to set aside and vacate the judgment on the grounds that a genuine dispute of a construction eviction which had merged into a fraud action remained. All of the motions were denied.

The petitioner and his wife had owned and operated a pizza restaurant in Fallon, Nevada for four years before being forced out of business by the lessors, the Palludan Corp., and counsel for that corporation, the Fallon City Attorney.

On April 19, 1978 the O'Connors filed suit against the Palludan Corporation for a breach of contract in failing to provide a habitable building by the terms of the lease and in compliance with the Nevada state laws. The suit was filed after considerable effort to get the Palludan Corporation to comply with the terms of the lease. The Palludan Corporation retained the Fallon City Attorney to represent them in the civil suit.

On August 2, 1978 the Fallon City Attorney had the petitioner arrested by two members of the Fallon police department for allegedly allowing minors to loiter in an establishment licensed for the distribution of alcohol. O'Connor was arrested outside his pizza building as he was unlocking the door to open for the evening business. The warrant was dated the day after O'Connor had attempted to complain to the city council of police harassment in his pizza business which had started since the city attorney was retained by the Palludan Corporation. O'Connor was on the agenda to speak to the council about the city attorney's conflict of interest. The Fallon City Attorney intervened during the meeting and advised O'Connor that he would not be allowed to speak due to the fact that criminal charges were

pending against him. O'Connor inquired as to the nature of the charges. The Fallon City Attorney assured him that the charges had been filed by the Fallon police department that day. O'Connor immediately checked with the assistant chief of police who advised him that there were no charges pending against him with the Fallon police department and that the complaint was coming from the Fallon City Attorney's office.

The warrant was signed by the Fallon municiple court judge William Teurman, a respondent herein, and was not supported by oath or affirmation by the arresting officers.

During the municipal court hearing, O'Connor was represented by his attorney of record at the time who moved the court to dismiss the complaint due to the vagueness of the ordinance and its obvious misapplication to Mr. O'Connor. O'Connor had received prior approval from the Fallon City Council allowing minors on the premises of his business when alcohol was being served. The only limitation that had been put on O'Connor was not to serve alcoholic beverages to minors. No minors were ever arrested out of O'Connor's establishment for the consumption of alcohol.

The alleged loiterers, witness for the prosecution, overwhelmingly established Mr. O'Connors innocence during the municipal court trial. However, the municipal court judge found O'Connor guilty nonetheless.

O'Connor then appealed to the Third Judicial District Court of Nevada. The judge was a former law partner of the Fallon City Attorney.

As a result of the testimony of the witnesses for the prosecution during the municipal court hearing, the Fallon City Attorney did not present them for cross-examination at the criminal trial de novo in the Third Judicial District Court of Nevada.

The petitioner's attorney moved the court for a dismissal on the grounds that no oath or affirmation had

been submitted in either court supporting the probable cause for O'Connor's arrest, the Fallon municipal ordinance was vague and to liberally construe it would be wrong, and that the prosecution witnesses were not there for cross-examination. The Fallon City Attorney then asked for a recess. Upon reconvening, the prosecution called the municipal court judge to give heresay testimony in substitution for the witnesses that had been cross-examined by Mr. O'Connor's attorney in the municipal judge's court. The judge for the Third Judicial District Court allowed this testimony by the municipal court judge even though he declared from the bench at the commencement of the trial that it was to be trial de novo and what had transpired in the municipal court would have no bearing on his decision. However, the district court found O'Connor guilty on *circumstantial evidence*. Pursuant to Article VI, Section 6 of the Nevada State Constitution, the state district court has final appellate court jurisdiction in cases arising in the inferior court tribunals.

Two civil trials subsequently ensued between the Palludan Corporation and the O'Connors, the latter of which was filed by the Palludan Corporation against the O'Connors for non-payment of rent. The O'Connors requested a corrected trial transcript during the second civil trial. Much of the pertinent testimony and the judge's decision as had been read from the bench had been omitted or changed. The court reporter refused to make the corrections which were necessary in order for the O'Connors to prove their counterclaim of constructive eviction in the second civil trial. Mr. O'Connor advised two district court judges in open court of the changes, one of which admitted that he saw error in the record but took no action. The O'Connors filed sworn criminal complaints with the local sheriff's office who forwarded them on to the county district attorney, John Hill, a respondent herein. The district attorney never contacted the O'Connors nor did he conduct an investigation.

The O'Connors were bombarded with civil litigation from the Fallon City Attorney over power bills from the city that were partly owed by the Palludan Corporation as well as the suit for non-payment of rent. They eventually were driven out of business and reached a point where they could no longer afford legal counsel and began pro se representation in the primitive common law self-help, self-defense method.

After the O'Connors were out of business, the Palludan Corporation secured a $12,000.00 building permit from the City of Fallon and proceeded to complete the building to the specifications that had been promised to the O'Connors but breached. The Palludan Corporation had done this for unjust enrichment as they began collecting nearly three times the rent from the new tenants that had been paid by the O'Connors. The O'Connors immediately filed a motion in opposition to the summary judgment on the grounds that the constructive eviction had merged into one of fraud for unjust enrichment.

The O'Connors demand for a jury trial pursuant to the Seventh Amendment of the Federal Constitution was denied.

The Supreme Court of Nevada dismissed the O'Connors appeal for failure to obtain counsel even though the O'Connors submitted the names of several attorneys to the court who had refused to represent the O'Connors before the Supreme Court in forma pauperis. The Supreme Court of Nevada also failed, refused, and neglected to exercise its discretion and appoint counsel.

The O'Connors have lost approximately $125,000.00 in equity and assets as well as loss to their excellent credit standing and their reputation.

The Palludan Corporation padlocked the O'Connors out of the building and would not allow the O'Connors to remove their equipment and miscellaneous items. The

Palludan's dispersed the O'Connor's property at will and without the consent of the O'Connors.

Consequently, the O'Connor's children have had their inheritance feloniously confiscated by and through an abuse of process in the state courts due to the denial of the right to a common law jury trial and the inalienable right to protect one's property on appeal in the proper person. The Palludan Corporation and the City of Fallon have several liens against the home of the O'Connors and the Fallon City Attorney has attached the petitioner's wages in the past.

It is significant to relate the fact that the O'Connors filed complaints with every investigative agency within the state. Each agency sent the O'Connors on to another agency claiming a lack of jurisdiction in the matter. In other words, they all passed the buck. The O'Connors filed a complaint with the Nevada State Bar Corporation against the Fallon City Attorney for conflict of interest and numerous other ethical rule violations during the aforementioned civil litigation. The Nevada State Bar counsel did not investigate and advised the O'Connors to file a complaint with the local district attorney. The local district attorney never contacted the O'Connors after the sworn criminal complaints were forwarded on to him by the sherrif's office. The O'Connors attempted to contact him by telephone but he never returned the calls. The Nevada State Attorney General's office claimed a lack of jurisdiction and said the matter should be investigated by the local district attorney. The petitioner and his wife also filed complaints with the Commission of Judicial Discipline of Nevada who also responded with a lack of jurisdictional claim. As a last resort, the O'Connors sought an inquiry from the Federal Bureau of Investigation who informed them that unless there was actual evidence that the judge took a pay-off, the said agency lacked jurisdiction. The O'Connors informed the bureau that they had witnessed the Fallon City Attorney meet privately in chambers with the judge during a recess of the two day civil

trial and just prior to the decision being read from the bench. The O'Connors attorney was not present at this covert meeting as he was in the courtroom reviewing his notes and preparing his summation.

During the 1981 session of the Nevada State Legislature the petitioner testified before several committees on all of the aforementioned facts. As a result of that testimony, rule 46(b) of the Nevada Rules of Appellate Procedures, *supra*, has been modified, *infra*, but it still does not comply with the intent of the framers of the Nevada State Constitution who included the provision of the inalienable right of self-representation in any court within the State of Nevada as is verified in the record of the constitutional debates and proceedings of 1864. The Nevada State Legislature (1981) also passed a joint resolution to amend Article VI, Section 21 of the Nevada State Constitution for improving the performance of the Commission of Judicial Discipline.

The measures taken by the Nevada State Legislature may improve the over-all performance of the state in the future, however, it does not remedy the petitioner's financial loss or the loss to his reputation. The State of Nevada continues to claim an Eleventh Amendment privilege from suit.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *MAINE V. THIBOUTOT*, 488 U.S. 1 (1980)

Both of the decisions in the courts below have neglected to give any consideration to the petitioner's arguments regarding this court's decision in *Maine v. Thiboutot, supra*. The district court makes a slight reference to it on page 548

of *O'Connor v. the State of Nevada, et al.*, 507 F. Supp. 546 (D. Nev. 1981). The Court of Appeals has made no reference to it whatsoever. For this reason, the Court should grant the writ. *Monroe v. Pape*, 365 U.S. 167 (1961). The Court of Appeals did find that it was error for the lower court to decide the Seventh Amendment issue thus affirming the petitioner's contention that the state is in fact liable for deliberately failing to include the right to a common law jury trial during the framing of her constitution and in violation of the *Northwest Ordinance of 1787*. However, the Court of Appeals apparently also found that the Eleventh Amendment of the Federal Constitution exempts the states from complying with the Federal Bill of Rights due to this court's decision in *Quern v. Jordan*, 440 U.S. 332 (1979).

Not so curiously, the petitioner's challenge of rule 46(b) of the Nevada Rules of Appellate Procedure has gotten lost in the quick shuffle between the Supreme Court of the State of Nevada, the Supreme Court of the United States, and the Federal District Court for the District of Nevada. The petitioner had included the issue in the original complaint in the action herein. While on appeal to the Supreme Court of the United States in *O'Connor v. Palludan Corp., supra,* the petitioner filed an amended complaint in this action and dropped the 46(b) claim with the intention of filing a supplemental pleading should this court deny the appeal. Whereas, this Court treated the papers as a petition for a Writ of Certiorari rather than an appeal which was dismissed for a want of jurisdiction, the petitioner filed a motion to file a supplemental pleading including the 46(b) issue on February 11, 1981 which was denied in a minute order on April 22, 1982 by the Federal District Court. Therefore, the main issue in this case is not appealable herein. Had the O'Connors been able to represent themselves on appeal to the Supreme Court of Nevada, most of the causes of action in the civil right's suit herein would have become moot and the state would have provided the remedy for the O'Connor's financial loss. Accordingly, the right to a common law jury trial by and

through the *Northwest Ordinance* and the Seventh Amendment of the Federal Constitution would have also provided the remedy. However, this court has eliminated the remedies set forth in the Federal Bill of Rights in its decision of *Quern v. Jordan, supra.*

In Nevada, governmental immunity has fostered legal plunder. None of the state agencies by and through her agents will take action against the governing. Governmental immunity suppresses the truth and oppresses the innocent in Nevada. The ruling members of Nevada's despotic aristocracy observe a *Code of Omerta* rather than a *Code of Professional Responsibility* or a *Code of Judicial Canons.*

There are no federally protected rights in the State of Nevada due to the Eleventh Amendment of the Federal Constitution. The right to due process and equal protection of the laws and the provision of rights in the Nevada State Constitution are nullified by the Court's interpretation of the Eleventh Amendment of the Federal Constitution. The equality of *rights* on a non-discriminatory basis are a matter of mere privileges for the citizens of Nevada and are granted by the grace of the state only. The state's constitutional declaration of rights is a dead letter as there is no one to enforce those provisions.

The petitioner has suffered great financial and personal loss through the malicious misuse of the state courts and there is no remedy. The perpetrators are shielded by the court's absolute judicial immunity and the state's sovereign immunity.

The failure of the states to enforce the laws on the books is exactly why the Civil Rights Act of 1871 was passed. *Monroe v. Pape, supra.*

The concept of immunity was to protect honest officials from error in judgment. It was never intended to conceal corrupt acts. This Court found that it was better to risk some error than not to decide or act at all. *Scheurer v. Rhodes*, 416 U.S. 232 (1974) at 242.

Yet, this is exactly what the State of Nevada and all of her officers and agencies have done, they did not act at all. Should it be necessary to name nearly every governing official in the state in this suit? For if one is to blame, all are to blame. The state is the fountain head and the supreme authority and therefore it is her responsibility to govern her governing.

Chief Justice John Jay defined sovereignity as *the right to govern* in *Chisholm v. Georgia*, 2 U.S. 419 (1793) at 472.

None of Nevada's agencies or officers have asserted a good faith immunity because the misuse of the disuse of the state law, the state constitutional law, and the federal constitutional law was not done in good faith.

The Court found that *a state is a person* when she denies to any person within *her* jurisdiction the equal protection of the laws. Whoever by virtue of his public position under a state government deprives another of life, liberty, or property without due process of law, or denies or takes away the equal protection of the laws, violates the inhibition; and as he acts in the name of the state, and is clothed with *her* power, his act is *her* act. Otherwise, the inhibition has no meaning and the state has clothed one of *her* agents with the power to annul or evade it. *Ex Parte Virginia*, 100 U.S. 339 (1879). Note: Eight years after the passage of the Civil Rights Act of 1871.

In *Maine v. Thiboutot, supra*, the Court found that the Title 42 U.S.C.§ 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. The constitutional *law* referred to by the Court obviously encompasses the Federal Bill of Rights and the Fourteenth Amendment of the Federal Constitution.

The Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. *Federalist Paper, No. 78*, by Alexander Hamilton.

It is the duty and the prerogative of the federal govern-

ment to guarantee to every citizen due process and equal protection of the state laws by and through the Fourteenth Amendment of the Federal Constitution.

It is the duty of the states to enforce the provisions of the Supreme Law of the Land pursuant to Article VI, Par. (2) of the United States Constitution.

In Article I, Section 2, of the Nevada State Constitution, Nevada has assumed a subordinate position to the federal government.

The integrity of a state is no greater than the integrity of those she entrusts to manage her affairs; she is one among equals. Her entitlement to governmental immunity should be no greater than that to those individuals or agencies she employs to govern. Therefore the State of Nevada is entitled to a good faith qualified immunity only.

The State of Nevada has defeated the theory that a lack of official immunity and the threat of liability in civil rights suits would deter her governing officials' willingness to execute their state official duties with the decisiveness and the judgment required by the public good.

Making the state governments liable for malicious and wreckless civil rights deprivations would close the floodgates on civil rights abuses and accordingly would reduce the necessity of civil rights actions.

The State of Nevada voluntarily waived a lack of jurisdictional claim over the subject matter when she failed to govern her governing. A damage remedy is appropriate, since there are no available forms of relief. *Davis v. Passman*, 442 U.S. 228 (1979).

II.

THE DECISION BELOW REGARDING ABSOLUTE PROSECUTORIAL IMMUNITY CONFLICTS WITH THE COURT'S DECISION IN *SCHEURER V. RHODES*, 416 U.S. 232 (1974).

This 1871 civil rights action is brought against the county prosecutor for failing to initiate an investigation into criminal charges that were filed by the O'Connors against local public officials. The prosecutor never contacted the O'Connors nor did he attempt to conduct any type of investigation. The Court of Appeals has affirmed the district court decision that the prosecutor and respondent in this action is absolutely immune for doing absolutely nothing. However, the Court has found that the immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and the responsibilities of the particular office and the circumstances existing at the time the challenged action was taken. *Scheurer v. Rhodes, supra.*

The respondent has not asserted a good faith claim of immunity. The acts complained of by the petitioner were not in a prosecutorial capacity. Rather, the acts complained of are of a police/investigative nature. Based upon the above-mentioned facts, the respondent is entitled to qualified immunity only.

This conflict justifies the grant of the writ to review the opinion and judgment below.

III.

THE DECISION BELOW REGARDING ABSOLUTE IMMUNITY FOR *WITNESSES* IN STATE JUDICIAL PROCEEDINGS CONFLICTS WITH THE COURT'S DECISION IN *BRADLEY V. FISHER*, 13 Wall. 335 (1871).

The lower courts have set a most disturbing precedent in granting the motion to dismiss of respondent Municipal Court Judge William Teurman on the grounds that he is absolutely immune from suit as a *witness* in a state judicial proceeding. This decision must be overturned or the Eleventh and Fourteenth Amendment rights of the Federal Constitution will have no force and effect in the state court proceedings of Nevada and might influence the procedure in other states as well.

The Court of Appeals has affirmed the District Court decision that *witnesses* in state judicial proceedings are to be given absolute immunity from suits under the Civil Rights Act or under a *Bivens*-type remedy. However, this Court did not decide nor affirm the so-called *Bivens*-type remedy. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

The respondent-judge was not a *witness* to the alleged crime for which the petitioner herein was being tried in the state district court. Nor had the respondent been subpoenaed by the prosecution. The respondent-judge appeared as a substitution witness for those prosecution eyewitnesses that testified at the municipal court hearing of which the same judge had presided. These excluded prosecution eyewitnesses which appeared in municipal court had supported the innocence rather than the guilt of the petitioner and therefore were not called by the prosecution during the trial de novo even though their testimony was absolutely indispensable for a criminal conviction. The respondent-judge testified to the ages of the persons he had found guilty in his court for allegedly loitering in the establishment of the petitioner

herein. The denial of the Sixth Amendment right to cross-examine the witnesses that had appeared in the lower court is an egregious violation of fundamental fairness. Such conduct by the state government constitutes prima facie evidence of deprivation of due process. Constitutional error in a criminal trial can be held harmless only if the court is able to declare belief that it was harmless beyond a reasonable doubt. *Clark v. Blackburn* (5th. Cir.) 632 F. 2d 531 (1980).

The State of Nevada, by and through her agency the Third Judicial District Court of Nevada, has not asserted a good faith defense based upon harmless error or otherwise. Nevada state rules of criminal procedure make no provisions for the appearance of a municipal court judge, clothed with the authority of his office, to appear in criminal trials de novo to give heresay testimony as to what had transpired in his court. This is an absolute abuse of judicial power in a non-judicial act of conspiracy to obstruct justice.

The respondent-judge also violated the petitioner's Fourth Amendment right of the United States Constitution when he issued a warrant for the arrest of the petitioner that was not supported by oath or affirmation by anyone. Nevada State Law does provide that no warrant shall issue but upon probable cause supported by oath or affirmation. In the Fourteenth Amendment, provision against any state denying to any person within its jurisdiction, equal protection of the laws, the quoted phrase includes the right to be tried and punished in the same manner as others accused of crime are tried and punished . . . *U.S. v. Lynch*, 94 F. Supp. 1011 (1950).

The lower court has classified the appearance of the respondent-judge in the criminal trial de novo of the petitioner as that of *citizen-witness*. The petitioner maintains the appearance of the respondent-judge in the said trial was that of *judge-conspirator* in clear absence of all jurisdiction. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exer-

cise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. *Bradley v. Fisher,* 13 Wall. 335 (1871).

IV.

THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *COUNTY OF LINCOLN V. LUNING,* 133 U.S. 529 (1890), REGARDING THE ABSOLUTE IMMUNITY OF THE NEVADA STATE BAR CORPORATION

The Nevada Bar is not a state agency but rather is a public corporation which can sue and be sued. NRS. 7.275 and NSCR 76.

It has long been decided that municipal corporations in Nevada have no Eleventh Amendment protection. *County of Lincoln v. Luning, supra.* It is held to be a municipal corporation within the meaning of Article VIII, Section 1 of the Nevada State Constitution. In *re Scott,* 292 Pac. 291 (1930).

The lower court has found that the Nevada Bar could not be sued pursuant to 42 U.S.C.§ 1983 if it was a state agency. *Ginter v. State Bar of Nevada,* 625 F. 2d 829 (CA 9 1980). In reading the decision, heavy reliance was placed on *Quern v. Jordan, supra.* The Eleventh Amendment decision in that case was based upon the state treasury being the source of funds for payment. However, Article IX, Section 4 of the Nevada State Constitution says:

> *The state shall never assume the debts of any county, town, city or other corporation whatever, unless such debts have been created to repel invasion, suppress insurrection or to provide for the public defense.*

In *Monell v. Department of Social Services,* 436 U.S. 658 (1979), the court found that municipal corporations are persons within the meaning of 42 U.S.C.§ 1983.

The petitioner has been denied equal protection of the disciplinary rules by the Nevada State Bar Corporation. Thus, a claim properly lies against the said corporation and respondent herein.

Disciplinary rules do not arise out of controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. *Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719 (1980).

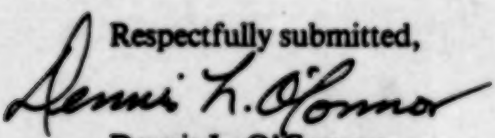
The Nevada State Bar Corporation operates autonomously and does not receive any state funding. Therefore, this respondent is not a state agency. (See Article VIII, Section 9, Nevada State Constitution.)

Finally, the decision below did not address the petitioner's issue of remedy. Is there no remedy?

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,



Dennis L. O'Connor
870 Soda Lake Road
Fallon, Nevada 89406
(702) 867-3121
Petitioner in counsel pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS O'CONNOR, *Plaintiff-Appellant,* vs. **STATE OF NEVADA, et al.,** *Defendants-Appellees.*	*No. 81-5423 (D.C. No. CV-80-76, RDF)*

OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding
Argued and Submitted March 5, 1982

BEFORE: WALLACE and CANBY, Curcuit Judges, and EAST,* District Judge.

PER CURIAM:

O'Connor appeals a dismissal of his civil rights actions brought against the State of Nevada, several of its agencies, Churchill County District Attorney Hill, and Fallon Municipal Court Judge Teurman. O'Connor alleged various violations of his constitutional rights pursuant to 42 U.S.C.§§ 1983, 1985 and 1986, as well as various constitutional amendments and provisions. The district court granted motions to dismiss pursuant to Fed. R. Civ. P 12(b)(1) and (6) as to all defendants. The essential facts can be found in the district court's opinion. *O'Connor v. State of Nevada*, 507 F. Supp. 546 (D. Nev. 1981) *(O'Connor)*. We affirm.

As to the dismissal of suit against Judge Teurman and District Attorney Hill, we agree with the district court that Judge Teurman, as a witness in a state judicial proceeding, and District Attorney Hill, as a state prosecutor, are both

absolutely immune from civil rights suits. *O'Connor, supra,* 507 F. Supp. at 548-50. O'Connor also suggests that besides Judge Teurman's participation as a witness in the state judicial proceeding, his handling of O'Connor's prior municipal court action violated his constitutional rights. Clearly, though, Judge Teurman is immune from civil rights suits for judicial acts not taken in the absence of all jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 357 (1978); *Rankin v. Howard,* 633 F.2d 844, 847 (9th Cir. 1980), *cert. denied,* 451 U.S. 939 (1981).

O'Connor alleged that the State of Nevada denied him his rights under the seventh and fourteenth amendments by requiring a deposit for a civil jury trial pursuant to Rule 38 of the Nevada Rules of Civil Procedure. O'Connor sought injunctive relief and damages for these alleged constitutional violations. The district judge dismissed the action on the basis that the seventh amendment right to jury trial in civil cases does not apply in state court. *O'Connor, supra,* 507 S. Supp. at 548.

It was error for the district court to decide this issue. It is clear that under the eleventh amendment a state or its agencies cannot be sued in federal court without its consent. *Alabama v. Pugh,* 438 U.S. 781, 782 (1978); *Mills Music, Inc. v. Arizona,* 591 F.2d 1278 (9th Cir. 1979). Nevada has explicitly refused to waive its immunity to suit under the eleventh amendment. Nev. Rev. Stat. § 41.031(3). The Supreme Court has made it clear that section 1983 does not constitute an abrogation of the eleventh amendment immunity of the states. *Quern v. Jordan,* 440 U.S. 332, 338-41 (1979). The district court should have dismissed the claims against the State on the basis of the eleventh amendment.

The district court also granted a motion to dismiss on behalf of the State Bar of Nevada. The district court reasoned that the state bar is the investigative arm of the Supreme Court of Nevada, charged with investigating and disciplining the legal profession of the state, and as such an

agency, it too is immune from suit in federal court under the eleventh amendment. *O'Connor, supra*, 507 F. Supp. at 550. We agree. *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980) (per curiam).

The Supreme Court of Nevada and the Third Judicial District Court of Nevada, as agencies of the state, were also properly dismissed from suit on eleventh amendment grounds. *O'Connor, supra*, 507 F. Supp. at 550-51.

AFFIRMED.

* Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DENNIS L. O'CONNOR,
Plaintiff,

vs.

STATE OF NEVADA, et al.,
Defendants.

Civil LV 80-76 RDF

ORDER RE MOTIONS

Plaintiff's pro se complaint alleges that various agencies and public officials of the State of Nevada, the City of Fallon, and Churchill County violated his constitutional rights. Jurisdiction of this Court arises under Title 28, U.S.C. § 1331 and Title 28, U.S.C., § 1343. Plaintiff institutes this action under Title 42, U.S.C., §§ 1983, 1985 and 1986, and Article I, Section 9, and the First, Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

MOTIONS BEFORE THIS COURT

Defendants State Bar of Nevada, the Nevada Supreme Court, the Third Judicial District Court of Nevada, Churchill County District Attorney John Hill, and Fallon Municipal Court Judge William Teurman filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Defendant State of Nevada filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and Rule 12(b)(6), FRCP. Plaintiff filed a motion to strike defendant State of Nevada's motion to dismiss.

Defendants Nevada Supreme Court, the Third Judicial District Court, and the State Bar of Nevada have also filed

motions for a protective order to stay discovery. In return, the plaintiff has filed a motion to compel responses to interrogatories from defendants Nevada Supreme Court, the Third Judicial District Court, and the State Bar of Nevada. Plaintiff has also filed a motion to enlarge the time for notice of discovery.

This Court recognizes that pro se complaints are to be held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), reh. denied, 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 819 (1973). Also, that pleadings in civil rights suits are to be liberally construed. *Roberts v. Acres,* 495 F.2d 57 (7th Cir. 1974). This Court will not give a complete factual summary because not all of the defendents have filed motions with this Court. Instead, the relevant alleged facts will be given concerning each motion.

PLAINTIFF'S MOTION TO STRIKE DEFENDANT STATE OF NEVADA'S MOTION TO DISMISS

The plaintiff moved, pursuant to Rule 12(f) and Rule 8, FRCP, to strike defendant State of Nevada's motion to dismiss allegedly because the case authority relied upon by the State of Nevada to support its motion had recently been overturned by the United States Supreme Court. However, a Rule 12(f) motion to strike only concerns striking matters from pleadings and a motion to dismiss is not a pleading. *C.F. Hanraty v. Ostertag,* 470 F.2d 1096 (10th Cir. 1972); Rule 7(a), FRCP. Therefore, the plaintiff's motion to strike is hereby denied.

MOTION TO DISMISS FILED BY DEFENDANT STATE OF NEVADA

Plaintiff alleges that defendant State of Nevada denied him his rights under the Seventh and Fourteenth Amendments by requiring a deposit for a civil jury trial pursuant to Rule 38 of the Nevada Rules of Civil Procedure. Plaintiff

prays for an order to show cause why the State of Nevada should not honor the Seventh Amendment to the United States Constitution and for $500,000 in general damages and $500,000 in punitive damages. Defendant State of Nevada moves for dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

It is a basic tenet of constitutional law that the Seventh Amendment guaranty of a jury trial in civil cases is not an element of due process applicable to the state courts through the Fourteenth Amendment. *Woods v. Holy Cross Hospital*, 591 F.2d 1164 at 1171 (5th Cir. 1979), n.12 *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir. 1957). The motion to dismiss of the State of Nevada is hereby granted.

MOTION TO DISMISS FILED BY DEFENDANT JUDGE WILLIAM TEURMAN

Plaintiff alleges in his fourth, fifth, eighth and tenth causes of action that Judge William Teurman conspired with the City of Fallon and the Third District Court to deny him his Sixth, Eighth, Fourth and Fourteenth Amendment rights. Plaintiff prays for a judgment of $500,000 in general damages and $500,000 in punitive damages.

The factual basis for his claims is somewhat confusing. Plaintiff was apparently arrested on August 2, 1978, by police officers of the City of Fallon. Plaintiff was later convicted in Fallon Municipal Court where Judge Teurman was presiding. Plaintiff exercised his right of appeal by having a trial de novo in the Third District Court. NRS 177.015. Plaintiff alleges that his constitutional rights were violated when Judge Teurman appeared as a witness for the prosecution.

Judge Teurman filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FRCP. Courts have held that witnesses in state judicial proceedings are to be given absolute immunity

from suits under the Civil Rights Acts or under a *Bivens* type remedy.[1] *Myers v. Bull*, 599 F.2d 863 (8th Cir. 1979), cert. denied, 444 U.S. 901, 100 S.Ct. 213 (1980); *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978); *Burke v. Miller*, 580 F.2d 108, 109-10 (4th Cir. 1978); *Taylor v. Nichols, 558* F.2d 561, 564 (10th Cir. 1977); *Brawer v. Horowitz*, 535 F.2d 830, 836-37 (3rd Cir. 1976). Therefore, defendant Judge Teurman's motion to dismiss is hereby granted.

DEFENDANT JOHN HILL'S MOTION TO DISMISS

Plaintiff alleges that Churchill County District Attorney John Hill wilfully and negligently failed to investigate two criminal complaints filed by the plaintiff and his wife against the Fallon City Attorney and the stenographer of the Third District Court of Nevada for obstruction of justice. Plaintiff alleges that John Hill is conspiring to deny plaintiff his Fourteenth Amendment right to due process and equal protection of the laws. Plaintiff prays for $500,000 in general damages, $500,000 in punitive damages, and an order to show cause why the District Attorney should not conduct an investigation of the charges filed by the plaintiff. Defendant District Attorney John Hill filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FRCP.

It has long been held that a prosecutor is absolutely immune from civil rights suits for activities allegedly committed while in the course and scope of his employment and duties as a prosecuting attorney. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The question of whether the failure to initiate prosecution could lead to award of damages in a civil rights action was specifically addressed in *Raitport v. Provident Nat. Bank*, 451 F. Supp. 522, 528 (E.D. Pa. 1978). The Court held:

> "[T]hat the decision to approve or disapprove a private criminal complaint fits squarely within the broader function of 'initiating a prosecution,' and

> therefore it cannot subject a prosecutor to civil liability for damages under section 1983 . . . It would be anomalous to hold that because *Imbler* spoke only of 'initiating a prosecution,' the prosecutor who approves a complaint is subject to civil liability for damages . . . Just as the prosecutor who initiates a criminal case requires protection from the defendant who 'transform[s] his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.' *Imbler*, supra, 424 U.S. at 425, 96 S. Ct. at 992, so the prosecutor who concludes that prosecution is unwarranted requires protection from the complainant whose excessive zeal for invoking the criminal process blinds him to any aspects of the case that counsel against prosecution." Id.

Therefore, plaintiff's civil rights claims against District Attorney John Hill are dismissed as to damages.

The prayer for equitable relief presents a more difficult question. It has long been held that prosecutors are natural targets for injunctive suits since they are state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975). However, this case does not involve a situation in which a prosecutor is threatening to enforce an unconstitutional statute. Instead, the plaintiff is asking this Court to order the Churchill County District Attorney to conduct an investigation.

It has been held that federal district courts cannot order a United States Attorney to conduct an investigation or initiate a prosecution because it would violate the doctrine of separation of powers. *Ross v. United States Attorney's Office*, 511 F.2d 524 (9th Cir. 1975), cert. denied, 423 U.S. 831 (1975); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1975); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), cert denied, 85 S.Ct. 1767

(1965). The same considerations would seem to apply to this Court's power to order a district attorney to conduct an investigation under the doctrine of federalism. This matter was addressed in the case of *Inmates of Attica Correctional Facility v. Rockefeller*, supra. In *Attica*, a civil rights action was instituted in order to compel federal and state officials to investigate and prosecute persons who allegedly violated certain federal and state criminal statutes. The Court granted the defendants' motion to dismiss under Rule 12(b)(6), FRCP. The Court stated:

> "In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming 'superprosecutors.' . . . Such interference with the normal operations of criminal investigations, in turn, based solely upon allegations of criminal conduct, raises serious questions of potential abuse by persons seeking to have other persons prosecuted." Id. at 380.

For these reasons, then, the defendant District Attorney John Hill's motion to dismiss is also granted as to the claim for equitable relief.

MOTIONS TO DISMISS FILED BY THE STATE BAR OF NEVADA AND THE NEVADA SUPREME COURT

Plaintiff alleges in his twelfth cause of action that the State Bar of Nevada and the Nevada Supreme Court denied the plaintiff due process and equal protection of the law under the Fourteenth Amendment because they allegedly failed to investigate certain complaints that the plaintiff filed. The factual basis of the allegations is unclear from the plaintiff's complaint. Plaintiff prays for $500,000 in general damages, $500,000 in punitive damages, and an order to show cause

why the defendants should not conduct an investigation. Defendant State Bar of Nevada filed a motion to dismiss pursuant to Rule 12(b)(6), FRCP. Defendant Supreme Court of Nevada has also filed a motion to dismiss pursuant to Rule 12(b)(6), FRCP, and a motion to quash service pursuant to Rule 12(b)(5).

The State Bar of Nevada is the investigative arm of the Nevada Supreme Court charged with investigating and disciplining the legal profession in Nevada. NSCR 76 et seq. It has long been held that a state bar association, as an agency of the state, is not a "person" under the Civil Rights Acts § 1983 et seq. *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966); *Coopersmith v. Supreme Court, Colorado*, 465 F.2d 993 (10th Cir. 1972); *Silverton v. Department of Treasury*, 449 F. Supp. 1004 (C.D. Cal. 1978); cf. *Saier v. State Bar of Michigan*, 293 F.2d 756 (6th Cir. 1961), cert. denied, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961). The Supreme Court of Nevada is a part of the Judicial Branch of the State of Nevada and is created by the Nevada Constitution, article 6. It has also been held that the courts of a state are not "persons" subject to suit under Title 42, U.S.C., § 1983 et seq. *Coopersmith v. Supreme Court, Colorado*, 465 F.2d 993 (10th Cir. 1972); *Harris v. Louisiana State Supreme Court*, 334 F. Supp. 1289 (E.D. La. 1971); *Fox v. Juvenile Court*, 321 F. Supp. 67 (E.D. Pa. 1970). The United States Supreme Court has recently ruled that municipalities are "persons" subject to suit under the Civil Rights Acts. *Monell v. Department of Social Services of the City of New York*, 463 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1979). However, the Supreme Court has specifically reasserted its position that the State and its agencies are not "persons" subject to suit under the Civil Rights Acts. *Quern v. Jordan*, 440 U.S. 332, 338-40, 99 S.Ct. 1139, 59 L.Ed.2d 358, 365-66 (1979); *Alabama v. Pugh*, 328 U.S. 781, 789, 98 S.Ct. 3057, 57 L.Ed.2d 1114, 1116 (1978). Therefore, plaintiff's claims under the Civil Rights Acts are dismissed.

However, plaintiff has also asserted Title 28, U.S.C. § 1331 as a jurisdictional basis for this suit. Defendants State Bar of Nevada and the Nevada Supreme Court argue that the Eleventh Amendment bars the plaintiff's claims for damages and injunctive relief. It is clear that under the Eleventh Amendment a state or its agencies cannot be sued without their consent. *Alabama v. Pugh*, 328 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114, 1116 (1978); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). Nevada has explicitly refused to waive its immunity to suit under the Eleventh Amendment, Nrs 41.031(3). In *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it was held that suits against state officials to enjoin violations of constitutional rights were not forbidden by the Eleventh Amendment. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977). The State Bar of Nevada and the Nevada Supreme Court, however, are not state officials but are arms of the state itself. It is this Court's opinion that the State Bar of Nevada and the Nevada Supreme Court do not fall within the exception stated in *Ex Parte Youg*, supra, and are accordingly dismissed from the suit.

MOTION TO DISMISS ON BEHALF OF THIRD JUDICIAL DISTRICT COURT OF NEVADA

Plaintiff alleges that the defendant Third Judicial District Court violated plaintiff's civil rights as set forth in title 42, U.S.C. §§ 1983, 1985 and 1986, and the First, Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The alleged violations are said to have occurred when plaintiff had a trial de novo in the Third District Court concerning his conviction in the municipal court. Plaintiff alleges that there was malicious prosecution because of a conflict of interest on the part of the prosecu-

tor, that he was denied his right to confront witnesses when Judge William Teurman testified and that he was found guilty under an ordinance which had not yet been adopted. Plaintiff also alleges that the Court allowed the transcript to be altered in another civil trial to which he was a party and that the Court improperly granted summary judgment in still another civil action. Again, the factual basis for these allegations are unclear. Plaintiff prays for $500,000 in general damages, $500,000 in punitive damages, and an order expunging plaintiff's criminal conviction and returning his fine, plus interest. Defendant Third Judicial District Court has filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FRCP.

The Third Judicial District Court, a part of the Judicial Branch of the state, is also a creature of the Nevada Constitution, article 6. Neither a state or its agencies are "persons" subject to suit under the Civil Rights Acts. *Quern v. Jordan*, supra; *Alabama v. Pugh*, supra; *Coopersmith v. Supreme Court*, supra; *Quadra v. Superior Court of San Francisco*, 378 F. Supp. 605 (N.D. Cal. 1974). Therefore, plaintiff's claims under the Civil Rights Acts are dismissed.

Plaintiff also has asserted Title 28, U.S.C., § 1331 as a jurisdictional basis for this suit.

For the same reasons given above as to the State Bar of Nevada and the Nevada Supreme Court, this motion to dismiss is granted.

PLAINTIFF'S MOTION TO ENLARGE TIME FOR COMPLETION OF DISCOVERY

Plaintiff filed a motion to enlarge the time for completion of discovery. The original date set for such discovery was July 6, 1980. Plaintiff requested this Court to extend that time an additional six months or until January 6, 1981. The defendants have not filed a responsive memorandum in opposition to this motion as required by Local Rule 16(c).

For this reason, plus the multiplicity of defendants, this Court grants the plaintiff's motion and the new date for completion of discovery to April 1, 1981.

DISCOVERY MOTIONS

Since this Court has dismissed the State Bar of Nevada and the Nevada Supreme Court from this action, the defendants' motions for a protective order and the plaintiff's motion to compel responses to interrogatories are rendered moot.

Since this Court has dismissed the Third Judicial District Court of Nevada from this action, the defendant's motion for a protective order and the plaintiff's motion to compel responses to interrogatories are rendered moot.

DATED: January 26, 1982.

Roger D. Foley
District Judge

FOOTNOTES

[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS L. O'CONNOR, *Plaintiff/Appellant,*	No. 81-5423
vs.	DC CV 80-0076 RDF
THE STATE OF NEVADA, et al., *Defendants/Appellees.*	

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellant motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before October 14, 1982,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

Wallace
United States Circuit Judge

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Article VI, Paragrah (2), United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourth Amendment, United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment, United States Constitution:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment, United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Eleventh Amendment, United States Constitution:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

Fourteenth Amendment, United States Constitution; Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 2, Nevada State Constitution:

All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it. But the paramount allegiance of every citizen is due to the federal government, in the exercise of all its constitutional powers, as the same has been, or may be, defined by the supreme court of the United States, and no power exists in the people of this or any other state of the federal union to dissolve their connection therewith, or perform any act tending to impair, subvert, or resist the supreme authority of the government of the United States. The Constitution of the United States confers full power on the federal government to maintain and perpetuate its existence, and whensoever any portion of the states, or people thereof, attempt to secede from the federal union, or forcibly resist the execution of its laws, the federal government may, by warrant of the constitution, employ armed force in compelling the obedience to its authority.

Article VI, Section 6, Nevada State Constitution:

The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or right of possession to, or the possession of real property or mining claims, or the legality of any tax impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars, . . . They shall also have final appellate jurisdiction in cases arising in justices courts and such other inferior tribunals as may be established by law.

Article VIII, Section 1, Nevada State Constitution:

The legislature shall pass no special act in any manner relating to corporate powers except for municipal purposes; but corporations may be formed under general laws, and all such laws may, from time to time, be altered or repealed.

Article VIII, Section 9, Nevada State Constitution:

The state shall not donate or loan money or its credit, subscribe to or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.

Article IX, Section 4, Nevada State Constitution:

The state shall never assume the debts of any county, town, city, or other corporation whatever, unless such debts have been created to repel invasion, suprress insurrection, or to provide for the public defense.

Nevada Revised Statutes:

NRS 7.275 State Bar of Nevada: Continuation as public corporation; powers; rules of supreme court. (NRS, Vol. 1, p. 201 (1981) .)

1. The State Bar of Nevada, a public corporation heretofore, created by statute, is hereby continued under the exclusive jurisdiction and control of the supreme court.

2. The State Bar of Nevada has perpetual succession and a seal and it may sue and be sued.

Nevada Supreme Court Rules:

Rule 76. State Bar of Nevada: Public corporation; powers. (2.) The state bar has perpetual succession and a seal and it may sue and be sued . . . (NRS, Vol. 1, p. 346 (1979).)

Nevada Rules of Appellate Procedure:

46(b) (as revised in 1981) Appearances in Proper Person. With leave of the Supreme Court, a party may file, in proper person, written briefs and papers submitted in accordance with these rules, NRS, Vol. 2, p. 1433 (1981).

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

82-697

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS L. O'CONNOR, *Petitioner,*

v.

STATE OF NEVADA, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS (STATE OF NEVADA, NEVADA SUPREME COURT AND THIRD JUDICIAL DISTRICT COURT) IN OPPOSITION

RICHARD H. BRYAN
Attorney General of
the State of Nevada

HARRY W. SWAINSTON
Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 885-4170

Counsel for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DENNIS L. O'CONNOR, Petitioner,

v.

STATE OF NEVADA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS (STATE OF NEVADA, NEVADA SUPREME COURT and THIRD JUDICIAL DISTRICT COURT) IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals errored in ruling that the Petitioner's claims against the State of Nevada, the Nevada Supreme Court and the Third Judicial District Court of the State of Nevada were properly dismissed on Eleventh Amendment grounds by the District Court.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 686 F.2d 749 (1982) and also at page 1a of the Appendix hereto. The Opinion and Order Re Motions of the District Court, which appears in the Appendix hereto at page 4b, is reported at 507 F.Supp. 546 (1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1982. The Petition for Writ of Certiorari was filed on November 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eleventh Amendment and Nevada Revised Statute 41.031(3) are set forth in the Appendix hereto at page 15c.

STATEMENT OF THE CASE

On September 28, 1979, Petitioner, Dennis L. O'Connor (hereinafter O'Connor) filed a civil rights suit in the United States District Court for the District of Nevada naming a large number of defendants and asserting a "grab bag" of unrelated allegations against said defendants. Among the many defendants named were the State of Nevada, the Nevada Supreme Court and the Third Judicial District Court of the State of Nevada.

In his original complaint, O'Connor although naming the State of Nevada as a defendant, set forth no specific allegations against the State per se. As for the Nevada Supreme Court, O'Connor charged that his civil rights were violated by virtue of Nevada Rule of Appellate Procedure 46(b) which, at the time in question, prohibited pro per appeals to the State High Court and that his civil rights were further violated by the alleged failure

of the Nevada Supreme Court to conduct an investigation concerning alleged unethical and criminal conduct of a certain city attorney in Nevada. O'Connor also complained of rulings in an earlier criminal case in which he was a defendant in the Third Judicial District Court of the State of Nevada and also of the proceedings involved in a prior Third Judicial District Court civil case in which he once again was a defendant.

For his relief, O'Connor sought not only court removal from office of the city attorney, but also money damages from all the defendants including the State of Nevada, the Nevada Supreme Court and the Third Judicial District Court in the amount of "$100,000 pre-1965 silver dollars, or $500,000 in one unit so-called 'federal reserve notes'" as punitive damages and the same amounts as general damages.

On January 15, 1980, O'Connor filed an Amended Complaint again alleging violations of his civil rights and again naming the State of Nevada, the Nevada Supreme Court and the Third Judicial District Court as defendants. Similar allegations were made against the Nevada Supreme Court and the Third Judicial District Court as appeared in the original complaint, except that the allegations relating to Nevada Rule of Appellate Procedure 46(b) [pro per appeals] had been dropped by O'Connor from the case. The State of Nevada was now charged with violating O'Connor's Seventh Amendment rights to a jury trial. This time O'Connor's prayer for relief requested not only the same money damages, both punitive and general as were set forth in the original complaint, but also various orders to show cause as to why the State of Nevada should not honor the Seventh Amendment and why the Nevada Supreme Court should not conduct the requested investigation of the city attorney.

On January 28, 1980, the State of Nevada and the Nevada Supreme Court filed their Motion to Dismiss, the Amended Complaint filed January 15,

1980. The Third Judicial District Court filed a separate and similar Motion to Dismiss on January 29, 1980. Thereafter, on January 26, 1981, the United States District Court for the District of Nevada issued its Order regarding the numerous motions which had been filed with the court before that date. The District Court granted the State of Nevada's Motion to Dismiss on the ground that the Seventh Amendment guarantee of a jury trial in a civil case is not an element of due process applicable to the state courts through the Fourteenth Amendment. The District Court also dismissed the Nevada Supreme Court and the Third Judicial District Court on the grounds that neither Court is a "person" within the meaning of the Federal Civil Rights Act and as arms of the State of Nevada both courts are immune from suit in federal court under the Eleventh Amendment.

The District Court Order of January 26, 1981 became a final judgment on April 22, 1981 when the court granted a motion by defendants below for entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

O'Connor appealed to the Court of Appeals for the Ninth Circuit. On August 24, 1982, the Court of Appeals filed its opinion affirming the District Court dismissal of the complaint against, among others, respondents State of Nevada, the Nevada Supreme Court and the Third Judicial District Court of the State of Nevada, citing the Eleventh Amendment immunity of the State of Nevada and its courts. The Court of Appeals indicated the District Court should not even have ruled on O'Connor's Seventh Amendment claim in view of the Eleventh Amendment immunity of the State of Nevada.

ARGUMENT

The decision of the Court of Appeals is correctly decided and does not conflict with any decision of this Court or any other Court of Appeals. Further review is therefore unwarranted.

The Court of Appeals for the Ninth Circuit based its decision on the clear and long recognized rule that a sovereign state, like the State of Nevada, and its agencies cannot be sued in federal court without its consent, citing this Court's recent decision in Alabama v. Pugh, 438 U. S. 781, 782 (1978). The Court of Appeals noted that the State of Nevada has not given its consent to such a suit. In Nevada Revised Statute 41.031(3) the State of Nevada has explicitly refused to waive its immunity to suit under the Eleventh Amendment.

The Court of Appeals also correctly observed the fact that O'Connor purported to bring his action under 42 U.S.C § 1983 was of no consequence, for this Court had made it clear that § 1983 does not constitute an aborgation of the Eleventh Amendment immunity of the states. The Court of Appeals cited and relied upon this Court's recent decision in Quern v. Jordan, 440 U.S. 332, 338-342 (1979).

The Court of Appeals in basing its affirmance of the dismissal of the claims against the Nevada Supreme Court and the Third Judicial District Court on Eleventh Amendment grounds was equally correct. As arms or agencies of the State of Nevada, both these Courts enjoy the parent state's immunity from suit in federal court without consent. Quern v. Jordan, supra; Alabama v. Pugh, supra; Edelman v. Jordan, 415 U.S. 651, 662-663 (1974); Employees v. Missouri Public Health Department, 411 U.S. 279, 284 (1973); Ford Motor Company v. Department of Treasury of Indiana, 323 U.S. 459, 464-465 (1945).

Even though the Eleventh Amendment speaks specifically in terms of suits by citizens of another state, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens as well as those brought by citizens of another state. Edelman v. Jordan, supra; Employees v. Missouri Public Health Department, supra; Hans v. Louisiana, 131 U.S. 1 (1889).

O'Connor in his Petition for Writ of Certiorari, p. 10, as a reason for granting the Writ has suggested that the decision of the Court of Appeals and of the District Court conflicts with this Court's decision in the case of Maine v. Thiboutot, 448 U.S. 1 (1980). However, an examination of Thiboutot reveals nothing said therein which is inconsistent with this Court's previous ruling in Quern and Pugh as to the Eleventh Amendment immunity of states and their agencies. In fact, the Eleventh Amendment is not even mentioned in this Court's decision in Maine v. Thiboutot, supra, which is not surprising, since the case originated in a state, rather than a federal, court. Petitioner has seriously misread the case. O'Connor's argument regarding the Thiboutot decision is, therefore, without merit and no further review is warranted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RICHARD H. BRYAN
Attorney General

HARRY W. SWAINSTON
Deputy Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS O'CONNOR, Plaintiff-Appellant, vs. STATE OF NEVADA, et al., Defendants-Appellees.	)	No. 81-5423 DC No. CV-80-76, RDF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
ROGER D. FOLEY, DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED MARCH 5, 1982

BEFORE: WALLACE and CANBY, Circuit Judges, and EAST, * District Judge.

PER CURIAM:

O'Connor appeals a dismissal of his civil rights actions brought against the State of Nevada, several of its agencies, Churchill County District Attorney Hill, and Fallon Municipal Court Judge Teurman. O'Connor alleged various violations of his constitutional rights pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, as well as various constitutional amendments and provisions. The district court granted motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) as to all defendants. The essential facts can be found in the district court's opinion. O'Connor v. State of Nevada, 507 F. Supp. 546 (D. Nev. 1981) (O'Connor). We affirm.

* Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

As to the dismissal of suit against Judge Teurman and District Attorney Hill, we agree with the district court that Judge Teurman, as a witness in a state judicial proceeding, and District Attorney Hill, as a state prosecutor, are both absolutely immune from civil rights suits. O'Connor, supra, 507 F. Supp. at 548-50. O'Connor also suggests that besides Judge Teurman's participation as a witness in the state judicial proceeding, his handling of O'Connor's prior municipal court action violated his constitutional rights. Clearly, though, Judge Teurman is immune from civil rights suits for judicial acts not taken in the absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 357 (1978); Rankin v. Howard, 633 F.2d 844, 847 (9th Cir. 1980), cert. denied, 451 U.S. 939 (1981).

O'Connor alleged that the State of Nevada denied him his rights under the seventh and fourteenth amendments by requiring a deposit for a civil jury trial pursuant to Rule 38 of the Nevada Rules of Civil Procedure. O'Connor sought injunctive relief and damages for these alleged constitutional violations. The district judge dismissed the action on the basis that the seventh amendment right to jury trial in civil cases does not apply in state court. O'Connor, supra, 507 F. Supp. at 548.

It was error for the district court to decide this issue. It is clear that under the eleventh amendment a state or its agencies cannot be sued in federal court without its consent. Alabama v. Pugh, 438 U.S. 781, 782 (1978); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979). Nevada has explicitly refused to waive its immunity to suit under the eleventh amendment. Nev. Rev. Stat. § 41.031(3). The Supreme Court has made it clear that section 1983 does not constitute an abrogation of the eleventh amendment immunity of the states. Quern v. Jordan, 440 U.S. 332, 338-41(1979). The district court should have dismissed the claims against the state on the basis of the eleventh amendment.

The district court also granted a motion to dismiss on behalf of the State Bar of Nevada. The district court reasoned that the state bar is the investigative arm of the Supreme Court of Nevada, charged with investigating and disciplining the legal profession of the state, and as such an agency, it too is immune from suit in federal court under the eleventh amendment. O'Connor, supra, 507 F. Supp. at 550. We agree. Ginter v. State Bar of Nevada, 625 F.2d 829 (9th Cir. 1980) (per curiam).

The Supreme Court of Nevada and the Third Judicial District Court of Nevada, as agencies of the state, were also properly dismissed from suit on eleventh amendment grounds. O'Connor, supra, 507 F. Supp. at 550-51.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

DENNIS L. O'CONNOR, Plaintiff, vs. STATE OF NEVADA, et al., Defendants.	)	Civil LV 80-76 RDF ORDER RE MOTIONS

Plaintiffs pro se complaint alleges that various agencies and public officials of the State of Nevada, the City of Fallon, and Churchill County violated his constitutional rights. Jurisdiction of this Court arises under Title 28, U.S.C, ¶ 1331 and Title 28, U.S.C., § 1343. Plaintiff institutes this action under Title 42, U.S.C., §§ 1983, 1985 and 1986, and Article I, Section 9, and the First, Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

MOTIONS BEFORE THIS COURT

Defendants State Bar of Nevada, the Nevada Supreme Court, the Third Judicial District Court of Nevada, Churchill County District Attorney John Hill, and Fallon Municipal Court Judge William Teurman filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Defendant State of Nevada filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and Rule 12(b)(6), FRCP. Plaintiff filed a motion to strike defendant State of Nevada's motion to dismiss.

Defendants Nevada Supreme Court, the Third Judicial District Court, and the State Bar of Nevada have also filed motions for a protective order to stay discovery. In return, the plaintiff has filed a motion to compel responses to interrogatories from defendants Nevada Supreme Court, the Third Judicial District Court, and the State Bar of Nevada. Plaintiff has also filed a motion to enlarge the time for notice of discovery.

This Court recognizes that pro se complaints are to be held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972), reh. denied, 405 U.S. 948, 92 S. Ct. 963, 30 L.Ed.2d 819 (1973). Also, that pleadings in civil rights suits are to be liberally construed. Roberts v. Acres, 493 F.2d 57 (7th Cir. 1974). This Court will not give a complete factual summary because not all of the defendants have filed motions with the Court. Instead, the relevant alleged facts will be given concerning each motion.

PLAINTIFF'S MOTION TO STRIKE DEFENDANT STATE OF NEVADA'S MOTION TO DISMISS

The plaintiff moved pursuant to Rule 12(f) and Rule 8, FRCP, to strike defendant State of Nevada's motion to dismiss allegedly because the case authority relied upon by the State of Nevada to support its motion had recently been overturned by the United States Supreme Court. However, a Rule 12(f) motion to strike only concerns striking matters from pleadings and a motion to dismiss is not a pleading. Cf. Hanraty v. Ostertag, 470 F.2d 1096 (10th Cir. 1972); Rule 7(a), FRCP. Therefore, the plaintiff's motion to strike is hereby denied.

MOTION TO DISMISS FILED BY DEFENDANT STATE OF NEVADA

Plaintiff alleges that defendant State of Nevada denied him his rights under the Seventh and Fourteenth Amendments by requiring a deposit for a

civil jury trial pursuant to Rule 38 of the Nevada Rules of Civil Procedure. Plaintiff prays for an order to show cause why the State of Nevada should not honor the Seventh Amendment to the United States Constitution and for $500,000 in general damages and $500,000 in punitive damages. Defendant State of Nevada moves for dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

It is a basic tenet of constitutional law that the Seventh Amendment guaranty of a jury trial in civil cases is not an element of due process applicable to the state courts through the Fourteenth Amendment. Woods v. Holy Cross Hospital, 591 F.2d 1164 at 1171 (5th Cir. 1979), n. 12, Olesen v. Trust Company of Chicago, 245 F.2d 522 (7th Cir. 1957). The motion to dismiss of the State of Nevada is hereby granted.

MOTION TO DISMISS FILED BY DEFENDANT JUDGE WILLIAM TEURMAN

Plaintiff alleges in his fourth, fifth, eighth and tenth causes of action that Judge William Teurman conspired with the City of Fallon and the Third District Court to Deny him his Sixth, Eighth, Fourth and Fourteenth Amendment rights. Plaintiff prays for a judgment of $500,000 in general damages and $500,000 in punitive damages.

The factual basis for his claims is somewhat confusing. Plaintiff was apparently arrested on August 2, 1978, by police officers of the City of Fallon. Plaintiff was later convicted in Fallon Municipal Court where Judge Teurman was presiding. Plaintiff exercised his right of appeal by having a trial de novo in the Third District Court. NRS 177.015. Plaintiff alleges that his constitutional rights were violated when Judge Teurman appeared as a witness for the prosecution.

Judge Teurman filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). FRCP. Courts have held that witnesses in state judicial proceedings are to be given absolute immunity from suits under the Civil Rights Acts or under a Bivens type remedy. Myers v. Bull, 599 F.2d 863 (8th Cir. 1979), cert. denied, 444 U.S. 901, 100 S. Ct. 213 (1980); Blevins v. Ford, 572 F.2d 1336, 1338 (9th Cir. 1978); Burke v. Miller, 580 F.2d 108, 109-10 (4th Cir. 1978); Taylor v. Nichols, 558 F.2d 561, 564 (10th Cir. 1976). Therefore, defendant Judge Tuerman's motion to dismiss is hereby granted.

DEFENDANT JOHN HILL'S MOTION TO DISMISS

Plaintiff alleges that Churchill County District Attorney John Hill willfully and negligently failed to investigate two criminal complaints filed by the plaintiff and his wife against the Fallon City Attorney and the stenographer of the Third Judicial District Court of Nevada for obstruction of justice. Plaintiff alleges that John Hill is conspiring to deny plaintiff his Fourteenth Amendment right to due process and equal protection of the laws. Plaintiff prays for $500,000 in general damages, $500,000 in punitive damages, and an order to show cause why the District Attorney should not conduct an investigation of the charges filed by plaintiff. Defendant District Attorney John Hill filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FRCP.

It has long been held that a prosecutor is absolutely immune from civil rights suits for activities allegedly committed while in the course and scope of his employment and duties as a prosecuting attorney. Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976). The question of whether the failure to initiate prosecution could lead to award of damages in a civil rights action was specifically addressed in Raitport v. Provident Nat. Bank, 451 F. Supp. 522, 528 (E.D. Pa. 1978).

The Court held:

> "[T]hat the decision to approve or disapprove a private criminal complaint fits squarely within the broader function of 'initiating a prosecution,' and therfore it cannot subject a prosecutor to civil liability for damages under section 1983 . . . . It would be anomalous to hold that because Imbler spoke only of 'initiating a prosecution,' the prosecutor who approves a complaint is immune while the prosecutor who disapproves a complaint is subject to civil liability for damages. . . . Just as the prosecutor who initiates a criminal case requires protection from the defendant who 'transform[s] his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.' Imbler, supra 424 U.S. at 425, 96 S.Ct. at 992, so the prosecutor who concludes that prosecution is unwarranted requires protection from the complainant whose excessive zeal for invoking the criminal process blinds him to any aspects of the case that counsel against prosecution." Id.

Therefore, plaintiff's civil rights claims against District Attorney John Hill are dismissed as to damages.

The prayer for equitable relief presents a more difficult question. It has long been held that prosecutors are natural targets for injunctive suits since they are state officers who are threatening to enforce and who are enforcing the law. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975). However, this case does not involve a situation in which a prosecutor is threatening to enforce an unconstitutional statute. Instead, the plaintiff is asking this Court to order the Churchill County District Attorney to conduct an investigation.

It has been held that federal district courts cannot order a United States Attorney to conduct an investigation or initiate a prosecution because it would violate the doctrine of separation of powers. Ross v. United States Attorney's Office, 511 F.2d 524 (9th Cir. 1975), cert. denied, 423 U.S. 831 (1975); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2nd Cir. 1975); United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied, 85 S.Ct. 1767 (1965). The same considerations would seem to apply to this Court's power to order a district attorney to conduct an investigation under the doctrine of federalism. This matter was addressed in the case of Inmates of Attica Correctional Facility v. Rockefeller, supra. In Attica, a civil rights action was instituted in order to compel federal and state officials to investigate and prosecute persons who allegedly violated certain federal and state criminal statutes. The Court granted the defendants' motion to dismiss under Rule 12(b)(6), FRCP. The Court stated:

> "In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming 'super-prosecutors.'. . . . Such interference with the normal operations of criminal investigations, in turn, based solely upon allegations of criminal conduct, raises serious questions of potential abuse by persons seeking to have other persons prosecuted." Id. at 380.

For these reasons, then, the defendant District Attorney John Hill's motion to dismiss is also granted as to the claim for equitable relief.

MOTIONS TO DISMISS FILED BY THE STATE BAR OF NEVADA AND THE NEVADA SUPREME COURT

Plaintiff alleges in his twelfth cause of action that the State Bar of Nevada and the Nevada Supreme Court denied the plaintiff due process and equal protection of the law under the Fourteenth Amendment because they allegedly failed to investigate certain complaints that the plaintiff filed. The factual basis of the allegations is unclear from the plaintiff's complaint. Plaintiff prays for $500,000 in general damages, $500,000in punitive damages, and an order to show cause why the defendants should not conduct an investigation. Defendant State Bar of Nevada filed a motion to dismiss pursuant to Rule 12(b)(6), FRCP. Defendant Supreme Court of Nevada has also filed a motion to dismiss pursuant to Rule 12(b)(6), FRCP, and a motion to quash service pursuant to Rule 12(b)(5).

The State Bar of Nevada is the investigative arm of the Nevada Supreme Court charged with investigating and disciplining the legal profession in Nevada. NSCR 76 et seq. It has long been held that a state bar association, as an agency of the state, is not a "person" under the Civil Rights Acts § 1983 et seq. Clark v. Washington, 366 F.2d 678 (9th Cir, 1966); Coopersmith v. Supreme Court, Colorado, 465 F.2d 993 (10th Cir. 1972); Silverton v. Department of Treasury, 449 F. Supp. 1004 (C.D. Cal. 1978); cf. Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961), cert. denied, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961). The Supreme Court of Nevada is a part of the Judicial Branch of the State of Nevada and is created by the Nevada Constitution, article 6. It has also been held that the courts of a state are not "persons" subject to suit under Title 42, U.S.C., § 1983 et seq. Coopersmith v. Supreme Court, Colorado, 465 F.2d 993 (10th Cir. 1972); Harris v. Louisiana State Supreme Court, 334 F. Supp. 1289 (E. D. La. 1971); Fox v. Juvenile Court, 321 F. Supp. 67 (E.D. Pa. 1970). The United States Supreme Court has recently ruled that municipalities are "persons"

subject to suit under the Civil Rights Acts. Monell v. Department of Social Services of the City of New York, 463 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1979). However, the Supreme Court has specifically reasserted its position that the State and its agencies are not "persons" subject to suit under the Civil Rights Acts. Quern v. Jordan, 440 U.S. 332, 338-40, 99 S. Ct. 1139, 59 L.Ed.2d 358, 365-66 (1979); Alabama v. Pugh, 328 U.S. 781, 789, 98 S.Ct. 3057, 57 L.Ed.2d 114, 116 (1978). Therefore, plaintiff's claims under the Civil Rights Acts are dismissed.

However, plaintiff has also asserted Title 28, U.S.C., § 1331 as a jurisdictional basis for this suit. Defendants State Bar of Nevada and the Nevada Supreme Court argue that the Eleventh Amendment bars the plaintiff's claims for damages and injunctive relief. It is clear that under the Eleventh Amendment a state or its agencies cannot be sued without their consent. Alabama v. Pugh, 328 U.S. 781, 782, 98 S. Ct. 3057, 57 L.Ed.2d 1114, 1116 (1978); Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed 842 (1890); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979). Nevada has explicitly refused to waive its immunity to suit under the Eleventh Amendment, NRS 41.031(3). In Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), it was held that suits against state officials to enjoin violations of constitutional rights were not forbidden by the Eleventh Amendment. See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977). The State Bar of Nevada and the Nevada Supreme Court, however, are not state officials but are arms of the state itself. It is this Court's opinion that the State Bar of Nevada and the Nevada Supreme Court do not fall within the exception stated in Ex Parte Young, supra, and are accordingly dismissed from the suit.

MOTION TO DISMISS ON BEHALF OF THIRD JUDICIAL DISTRICT COURT OF NEVADA

Plaintiff alleges that the defendant Third Judicial District Court violated plaintiff's civil rights as set forth in Title 42 U.S.C., §§ 1983, 1985 and 1986, and the First, Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The alleged violations are said to have occurred when plaintiff had trial de novo in the Third District Court concerning his conviction in municipal court. Plaintiff alleges that there was malicious prosecution because of a conflict of interest on the part of the prosecutor, that he was denied his right to confront witnesses when Judge William Teurman testified and that he was found guilty under an ordinance which had not yet been adopted. Plaintiff also alleges that the Court allowed the transcript to be altered in another civil trial to which he was a party and that the Court improperly granted summary judgment in still another civil action. Again, the factual basis for these allegations are unclear. Plaintiff prays for $500,000 in general damages, $500,000 in punitive damages, and an order expunging plaintiff's criminal conviction and returning his fine, plus interest. Defendant Third Judicial District Court has filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FRCP.

The Third Judicial District Court, a part of the Judicial Branch of the state, is also a creature of the Nevada Constitution, article 6. Neither a state or its agencies are "persons" subject to suit under the Civil Rights Acts. Quern v. Jordan, supra; Alabama v. Pugh, supra; Coopersmith v. Supreme Court, supra; Quadra v. Superior Court of San Francisco, 378 F. Supp. 605 (N.D. Cal. 1974). Therefore, plaintiff's claims under the Civil Rights Acts are dismissed.

Plaintiff also has asserted Title 28, U.S.C., § 1331 as a jurisdictional basis for this

suit.

For the same reasons given above as to the State Bar of Nevada and the Nevada Supreme Court, this motion to dismiss is granted.

PLAINTIFF'S MOTION TO ENLARGE TIME FOR COMPLETION OF DISCOVERY

Plaintiff filed a motion to enlarge the time for completion of discovery. The original date set for such discovery was July 6, 1980. Plaintiff requested this Court to extend that time an additional six months or until January 6, 1981. The defendants have not filed a responsive memorandum in opposition to this motion as required by Local Rule 16(c). For this reason, plus the multiplicity of defendants, this Court grants the plaintiff's motion and the new date for completion of discovery to April 1, 1981.

DISCOVERY MOTIONS

Since this Court has dismissed the State Bar of Nevada and the Nevada Supreme Court from this action, the defendants' motions for a protective order and the plaintiff's motion to compel responses to interrogatories are rendered moot.

Since this Court has dismissed the Third Judicial District Court of Nevada from this action, the defendant's motions for a protective order and the plaintiff's motion to compel responses to interrogatories are rendered moot.

DATED: January 26, 1981.

/s/ Roger Foley
DISTRICT JUDGE

FOOTNOTES

1 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 19999, 29 L.ed.2d 619 (1971)

APPENDIX C

ELEVENTH AMENDMENT

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subject of any foreign state.

NRS 41.031(3)

The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.

82-697

Office - Supreme Court, U.S.
FILED
NOV 16 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1982

DENNIS L. O'CONNOR PETITIONER

vs.

THE STATE OF NEVADA, et al., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN ROGER DETWEILER, JR.
834 Willow Street
Reno, Nevada 89502
(702) 329-4100
Counsel for Respondent

In the Supreme Court of the United States

October Term, 1982

No. _____

DENNIS L. O'CONNOR PETITIONER

v.

THE STATE OF NEVADA, et al.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the decision below conflicts with the Court's decision in *County of Lincoln v. Luning*, 133 U.S. 529 (1890) regarding Eleventh Amendment immunity of the State Bar of Nevada.

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STATUTES INVOLVED

Nevada Supreme Court Rule (NSCR) 39 and 76 are set forth at Pet. App. 1a.

STATEMENT

The Nevada Supreme Court has inherent authority to regulate and discipline attorneys in the state of Nevada. Pursuant to these rules, the court organized the State Bar of Nevada to act as an administrative agency of the court to report and investigate violations of the rules of attorney conduct promulgated by the court.

The Petitioner filed a grievance complaint against an attorney licensed to practice law in Nevada with the State Bar of Nevada. The case was subsequently investigated and screened by the Disciplinary Committee. The Committee dismissed the grievance.

Petitioner then filed suit, naming the State Bar as a party, alleging the State Bar had somehow conspired to violate his civil rights, and sought damages and injunctive relief.

The U.S. District Court, District of Nevada, granted Respondent's Motion to Dismiss on the basis that the State Bar as an administrative arm of the Nevada Supreme Court is not a "person" under the Civil Rights Act 1983 et seq. The Court of Appeals for the Ninth Circuit upheld that dismissal on the basis that the State Bar of Nevada was immune from suit pursuant to the Eleventh Amendment.

ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with any decision of this court or any other Court of Appeals. Further review is therefore unwarranted.

The Nevada Supreme Court has inherent and exclusive authority to regulate and discipline attorneys in the State of Nevada. Nevada Supreme Court Rule (NSCR) 39. Acting within its authority, the court has promulgated rules of conduct for attorneys in Nevada, and the court has organized the State Bar of Nevada to act as an administrative agency of the court to report and investigate violations of these rules. In establishing the existence and duties of the State Bar of Nevada, the Supreme Court has retained exclusive jurisdiction and control of the State Bar. NSCR 76. In disciplinary proceedings, the Bar Association acts in a quasi-judicial capacity and as an arm of the State Supreme Court, with respect to which it is not a "person" but is an administrative agency of the court and is entitled to immunity under the Eleventh Amendment.

Petitioner argues that the State Bar is not a state agency as it does not receive any state funding. In making such argument Petitioner has ignored the myriad of cases which have held that a State Bar acting in attorney disciplinary matters does so as an administrative arm of the State Supreme Court and is not a person subject to suit under the Civil Rights Act. *Clark v. Washington,* 366 F.2d 678 (9th Cir. 1966); *Coopersmith v. Supreme Court, Colorado,* 465 F.2d 993 (10th Cir. 1972); *Silverton v. Department of Treasury,* 449 F.Supp. 1004 (C.D. Cal. 1978); *Ginter v. State Bar of Nevada,* 625 F.2d 829 (9th Cir. 1980) (per curiam).

The Petitioner also lacks standing to seek proscriptive relief in this action. Petitioner seeks a mandate to have the State Bar investigate his grievance complaint. However, the Federal Constitution does not guarantee to an individual the right to require the State Bar to process his requests for an investigation of an attorney. *Saier v. State Bar of Michigan,* 293 F.2d 756 (6th Cir. 1961). The court in that case stated of the complainant that:

... The ultimate that he might expect from this (the investigation of the complaint) would be the disbarment of the accused lawyers. This might give him a certain amount of personal satisfaction but no material gain would result to him as a consequence of such action. It would not give him any judgment against the lawyers of whose misconduct he complains and whose actions caused him financial loss. Therefore he has not been deprived of "life, liberty, or property***..."

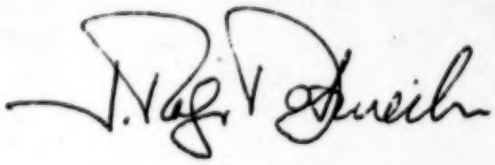
Not only has he not suffered, according to the allegations of his complaint, any deprivation of a right under the Federal Constitution as a matter of fact, but legally no such right as he claims is guaranteed to him by the Federal Constitution at 759.

As in *Saier,* supra, the Petitioner lacks a legal right to require the State Bar to conduct an investigation. The Petitioner has, therefore, failed to state a claim upon which to obtain injunctive relief. Additionally, the State Bar is not a "person" subject to suit for damages under the Civil Rights Act 1983 et seq.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



JOHN ROGER DETWEILER, JR.
Attorney for Respondent
STATE BAR OF NEVADA
834 Willow Street
Reno, Nevada 89502

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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STATE OF NEVADA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS (WILLIAM TEURMAN AND JOHN HILL) IN OPPOSITION

WILLIAM G. COBB
601 South Arlington Avenue
Post Office Box 3559
Reno, Nevada 89505
Telephone: (702) 786-3930

Counsel for Respondents
WILLIAM TEURMAN and JOHN HILL

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QUESTION PRESENTED

Whether the decision rendered by the United States Court of Appeals for the Ninth Circuit is contrary to prior rulings of this Court pertaining to judicial and prosecutorial immunity.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 686 F.2d 749 (1982) and also at page *1a* of the Appendix to the Brief of Respondents State of Nevada, Nevada Supreme Court and Third Judicial District Court. The opinion and Order Re Motions of the District Court which appear in said Appendix at page *4b*, is reported at 507 F.Supp. 546 (1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1982. The Petition for Writ of Certiorari was filed on or about October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. Sections 1983, 1985 and 1986.

STATEMENT OF THE CASE

Initially, Respondents wish to point out that the so-called Statement Of The Case set forth on pages three through ten of the Petition of Dennis O'Connor is inaccurate, distorted and totally irrelevant to the issues involved herein. Respondents submit that matters involved herein must be restricted to the Record On Appeal before the Court of Appeals.

These Respondents incorporate herein by reference the Statement Of The Case contained in the Brief of Respondents State of Nevada, Nevada Supreme Court and Third Judicial District Court, and in the Briefs filed by Respondents in the Court of Appeals.

ARGUMENT

The decision of the Court of Appeals is correctly decided and does not conflict with any decision of this Court or any other Court of Appeals. None of the so-called issues raised by Petitioner contain new or unresolved issues, all of them having been previously decided by this Court and further review is unwarranted.

As to Respondent Judge William Teurman, the doctrine of judicial immunity, adopted by the United States Supreme Court in *Bradley v. Fisher,* 13 WALL. 335, 20 L.Ed. 646 (1872), exists for reasons well-founded in both public policy and good sense. That judges exercise their function without fear of reprisal or consequence is paramount to our legal system. *Scott v. Stansfield,* L.R. 3 EX. 220, (1868).

Petitioner's allegations are confusing. If these allegations are directed toward this Respondent's alleged abuse of judicial powers, then judicial immunity clearly applies. See *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967); *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed. 331, 98 S.Ct. 1099 (1978).

If, on the other hand, the allegations are directed toward his testifying as a witness in a totally separate trial over which he was not presiding, then the law is clear that the Defendant is entitled to rely upon the absolute immunity extended to witnesses in judicial proceedings. Numerous Courts have held that witnesses in a state judicial proceeding are to be given absolute immunity from suits under the Civil Rights Acts. *Myers v. Bull,* 599 F.2d 863 [(8th Cir. 1979), cert. denied, 444 U.S. 901, 100 S.Ct. 213 (1980)]; *Blevins v. Ford,* 572 F.2d 1136, 1338 (9th Cir. 1978); *Burke v. Miller,* 580 F.2d 108, 109-10 (4th Cir. 1978); *Taylor v. Nichols,* 558 F.2d 561, 564 (10th Cir. 1977); *Brawer v. Horowitz,* 535 F.2d 830, 836-37 (3rd Cir. 1976). Further, the competency of a Judge to testify as a witness in a trial in which he is not presiding has been upheld in *United States v. Frankenthal,* 582 F.2d 1102 (7th Cir. 1978).

As to Respondent District Attorney John Hill, it has long been held that a prosecutor is absolutely immune from civil rights suits for activities allegedly committed while in the course and scope of his employment and duties as a prosecuting attorney. *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 (1976).

The question of whether the failure to initiate prosecution could lead to award of damages in a civil rights action was specifically addressed in *Raitport v. Provident Nat. Bank,* 451 F.Supp. 522, 528 (E.D. Pa. 1978). The Court in the *Raitport* case held that the Assistant District Attorney was *absolutely immune* from liability for damages under 1983, and he was accordingly dismissed from the case. The Ninth Circuit Court of Appeals likewise recognizes the prosecutor's decision to prosecute—or not to prosecute—is intrinsically a function protected by the doctrine of prosecutorial immunity. *Robichaud v. Ronan,* 351 F.2d 533, 537 (9th Cir. 1965); *Sykes v. State of California, (Dept. of Motor Vehicles),* 497 F.2d 197, 200 (9th Cir. 1974).

The only case cited by Petitioner, *Scheurer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974), is distinguishable both factually and legally and of no assistance herein. It is clear that District Attorney John Hill is entitled to the absolute prosecutorial immunity previously accorded by this Court in *Imbler v. Pachtman, supra.*

CONCLUSION

Respondents respectfully submit that Petitioner's request for a Writ of Certiorari must be denied.

William G. Cobb

WILLIAM G. COBB
Attorney for Respondents
WILLIAM TEURMAN and JOHN HILL
601 South Arlington Avenue
Post Office Box 3559
Reno, Nevada 89505